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Jewish characters in eighteenth century English fiction and drama

Veen, Harm Reijnderd Sientjo van der

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CHAPTER V.

§ 1. What is to be our criticism of the Dutch rules of application contained in the maritime law of the Commercial Code?

We have seen that when a law is indicated which must then be applied by the Courts, that law is the one which, in the view of the Legislator, fundamentally and originally governs the contract and created it out of a simple agreement between the parties to which no legal consequences attached until the law in question transformed it into a contract and defined the resultant consequences. In the view of the Legislator these consequences result from the law indicated by him and the Judge must therefore apply that law to the contract.

Now assuming for a moment that the articles declared applicable the whole of Dutch law regarding a contract of carriage, instead of certain rules only, then in that case the conclusion would be that the intention was as follows: that the contract of carriage should sometimes be governed by the law of the place of departure (articles 517d § 1, 517y, 520f, 520t), at other times by the law of the place of destination (same articles), and finally on a few occasions by the law of the flag of the transporting vessel (518g, 520f).

Three different laws therefore would produce consequences arising out of the contract as soon as it was concluded; three different laws would define how far the parties were free to apply rules other than those made applicable by these three laws or to choose another law to govern their contract; three different laws would govern all the matters which we have found to be subject to the law governing the contract — the question therefore whether the contract was validly made or not, the question of intention or confidence, questions as to free consent, error, constraint, fraud, *laesio enormis* and their consequences, the cause and the subject, the care to be exercised, the necessity of evidence of default, ... the consequences of misperformance — indemnification, dissolution — and the penalty clause, questions of risk and *vis major*, the condition and the stipulation of time; the effect of a moratorium, the *obligatio in solidum*, divisibility or indivisibility, the claim

of third parties to have the contract annulled because of injury — *Actio Pauliana* —, the dissolution of the contract, etc." (a). Three different laws would thus complete the contract, three different laws would supply clauses omitted by the parties; three different laws might prohibit some (and, probably, different) clauses inserted by the parties and the mandatory rules of three different laws would replace these prohibited clauses. And it would be no argument to say that these three laws, the law of the port of loading, the law of the port of destination and the law of the flag, would in this concrete case be the same, as they would all three be Dutch law. The fact that, under an application rule, these three laws may by accident coincide, makes no difference as regards the provisions of the rule and the fact that it happens that the Dutch Court must follow the rule in cases where the indicated law is the Dutch law does not affect the system *qua system*. It is and remains a fact that here the law of the port of loading, the law of the port of discharge and the law of the flag are all indicated as the law applicable to the carriage of goods by sea, even though only in so far as concerns a few articles and for carriage to or from Dutch ports or by a Dutch ship. From a scientific point of view, the system, to say the least of it, does not appear to be correct, for an application rule should indicate the principle to be applied and not merely a few laws which it is easier for the Judge to apply.

§ 2. But we have not yet achieved our object. There is still more. We just now assumed that the application rules, instead of indicating a few articles only, made the whole Dutch law applicable. But there is a second complication: the application rules declare only a few, carelessly selected articles applicable. How, logically speaking, that is possible, is an enigma, for according to the Legislator, a certain law either governs the contract or it does not govern the contract. How is it, however, possible for some forty articles of a certain law to govern the position of the parties whilst the rest of the contract remains ungoverned? If the Legislator does not know, or does not wish to say, which law governs the contract, then it is for the Judge to choose the law according to his own convictions.

(a) See Part II, Chapter I, § 2 of this book.

But here we have the Legislator first of all pointing not to the law applicable, but to some forty applicable articles; and then leaving it to the Judge to choose the law to govern the contract. The latter, if he takes his task seriously, will never judge the contract according to all three of the possible laws: law of the place of loading, law of the place of destination and law of the flag. He can, therefore, never follow the Legislator's method, but must adopt some new criterion. The result is, as we have seen, that the contract is governed, in a few particulars, by the law indicated by the Legislator, after that by the law deemed applicable by the Judge and, in so far as the two laws thus indicated by the two authorities, permit, by the law chosen by the parties. Thus the law, chosen by the Judge, must not conflict with the mandatory articles declared applicable by the Legislator, and the law chosen by the parties must not conflict with the mandatory rules either of the law chosen by the Legislator, in so far as it is made applicable, or of the law chosen by the Judge. A remarkable system indeed.

In Chapter I § 6 of the Second Part of this book we have seen that the rules of application on this subject differ essentially from those of the Law Embodying the General Principles of the Legislation of the Kingdom, the "*Wet, Houdende Algemeene Bepalingen der Wetgeving van het Koninkrijk*" (May 15th 1829). Now the reason is apparent: the rules contained in the *Wet A. B.* (as the *Wet, Houdende Algemeene Bepalingen* etc. is called) declare one law applicable to a given subject; these rules apply three different laws. And if Ripert takes exception (in § 1468 of his book) to the system adopted in the Morocco Code, article 267, and calls that system "*une disposition exorbitante*", just because it ventures to "*appliquer à la fois aux transports qui sont à destination ou en provenance d'un port national et à l'appliquer même si le connaissance est créé à l'étranger et entre étrangers*", what would his opinion be of the Dutch Commercial Code in this respect?

We have seen the objections consisting in the fact that only a few articles are applied instead of the whole law; and the fact that a combination of three laws is deemed to govern the contract; but in addition to these objections there are practical disadvantages resulting from the combination of different rules of application.

Let us take an instance.

Articles 518h-k are applicable to transport to Dutch ports (article 520f). In Stockholm a voyage-charter is concluded between two Swedes for the carriage of timber from a Swedish port to Amsterdam by a Swedish vessel. The contract is drawn up in the Swedish language, the freight is payable in Swedish currency. The voyage-charterer concludes a sub-charter at the port of loading with a third party, likewise of Swedish nationality. In the original charter-party no mention is made of sub-chartering and we assume that the original charterer is permitted by Swedish law to conclude such a sub-charter. In Amsterdam the owner brings an action against the original charterer for compensation (or to have the contract dissolved), and though the whole question clearly must be decided by Swedish law, article 520f makes article 518h of the Dutch law applicable. According to that article, the original charterer had no right to conclude a sub-charter, as the charter party made no mention of sub-chartering: compensation would be awarded. This supposed decision can hardly be called just, even if it would be in complete accordance with the application rule the Judge has to follow. One wonders what Dutch law has to do with this case; however, the law of the port of destination governs this particular matter of transport to Holland, and the Court must comply with the legislative provisions regarding the law to be applied.

Now, another example, any day liable to come into reality: two Germans conclude a voyage-charter concerning a German ship at Hamburg, in the German language. Goods belonging to the charterer are to be loaded at Rotterdam for discharge at Hamburg. During the carriage the goods are damaged. The charterer sues the owner before the Court of Justice of his place of residence, Rotterdam. It appears that the owner is only responsible to the extent of fifty guilders per cubic metre net capacity of the ship, for article 474 is made applicable by article 517d to carriage from Dutch ports. According to German law such a limitation of liability would not exist or would be regulated in another manner. Why then does the Dutch law apply? We have, in fact, seen that it is generally accepted that the extent of the owner's liability is determined by his own national law, or rather by the law of the transporting ship. The result, produced by the Dutch law, is, consequently, absolutely in conflict with these generally accepted principles.

§ 3. If one may be permitted to suggest a system of Private International Law *de jure constituendo* in place of the conglomeration of different criteria adopted in our Commercial Code, then the system of the law of the flag is to be recommended. The advantages of this system have been amply expounded here. The disadvantage in regard to the negotiability of bills of lading could be met by a special regulation for bills of lading issued in Holland; this regulation, however, would have to be strictly confined to such bills of lading and should simply impose the necessary restriction as to the carrier's liability.

This regulation could then, notwithstanding the fact that the law of the flag fundamentally governs the contract of carriage, be applied by the Courts on the ground of public policy, in the sense that the proper and originally applicable law (that of the flag) is replaced by a rule of the *lex fori* (with special reference to bills of lading) in order to protect the interest of third parties.

Would a rule, such as the rule that contracts of carriage are to be governed by the law of the flag, constitute a *novum* for the Dutch doctrine? This solution consists of the judging of the relations between one person or a group of persons (the carrier or shipping company) on one side and a number of independent persons, previously unrelated (the shippers or consignees) on the other side, according to the law of the country of the person or group of persons first mentioned, irrespective of where the contract was concluded or must be executed. From the point of view of international law the position of the carrier in relation to the shippers or consignees of different nationality (if their nationality is the same, there is all the more reason to apply the common national law of the flag) can very well be compared to that of the insurance-company in relation to insured persons of different nationality and domicile.

In the latter case Dutch jurisprudence and doctrine assume it to have been the intention of the insurance-company that its own national law should apply to its agreements, whilst on the other hand the insured person is deemed "*vertrouwen te stellen in de bedrijfsorganisatie en zich te hebben willen onderwerpen aan het recht, hetwelk dat bedrijf regeert (b)*".

(b) Kusters p. 757 (to have confidence in the organisation of the insurer's business and to have submitted himself to the law governing that business).

This reasoning also applies in justification of the choice of the law of the flag to govern the contract for carriage of goods by sea, for "Im Seerecht ist das Recht der Flagge das Quasi-Personal-Statut des den Erwerb durch den Seefahrt treibenden Unternehmens" (c).

The two cases are, indeed, absolutely parallel; he who defends the one, is logically forced to accept the other. Eras (d) draws this conclusion as regards transports by land, but omits to do so as regards transport by sea. Nussbaum (e) writes: "Wer mit einer Bank, einer Versicherungsgesellschaft, einer Transportanstalt oder einem ähnlichen Unternehmen, das in grossem Umfange Geschäfte typischer Art abzuschliessen pflegt, als Kunde in Verbindung tritt, muss davon ausgehen, dass er diese Geschäftsverbindung demjenigen Recht unterwirft, unter welchem das Unternehmen lebt; dies schon deshalb, weil er sich sagen muss, dass das Unternehmen mit ausländischen und inländischen Kunden im Zweifel unter gleichen rechtlichen Bedingungen arbeiten will."

§ 4. In the Wet, Houdende Algemeene Bepalingen der Wetgeving van het Koninkrijk, (Law Embodying the General Principles Governing the Legislation of the Realm) an article should therefore be inserted making the law of the flag applicable to contracts for carriage of goods by sea.

The rules, contained in the Commercial Code, which guarantee the negotiability of the bill of lading, ought to be made applicable to bills of lading issued for transport from Dutch ports. This would provide a system scientifically sound and fair to the parties to the contract, and which would guarantee the negotiability of the bill of lading, thereby protecting the rights of third parties, whilst at the same time it would be in accordance with the prevailing Dutch conception of the law. A system, in short, which is, in our opinion, desirable for everyone; which does justice to the rights of everyone, functions in a simple, practical and easy way, and permits of no

(c) Nussbaum p. 213; See also Lewald p. 219, Gutzwiller p. 1609-1610.

(d) p. 143.

(e) p. 231.

uncertainty; which obviates confusion as to the law applicable and is easy for the Judge to apply.

Questions relating to loading and discharge must remain subject to the law of the place where these operations are carried out, as article 517d § 2 quite rightly provides. This regulation should, however, also be incorporated in the Wet Houdende Algemeene Bepalingen der Wetgeving van het Koninkrijk.